

DELEGATED AUTHORITY REPORT

Title: Appropriation of Council land at London Road/North Street, Barking to facilitate development

Open Report with Exempt Appendices

The Appendices are exempt within the meaning of Category 3 of Appendix 1 to Part 2, Chapter 17, Access to Information, of the Council's Constitution being information relating to the financial or business affairs of any particular person (including the authority holding that information)

Wards Affected: Abbey

Key Decision: No

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Accountable Strategic Leadership Director: Fiona Taylor, Acting Chief Executive

Recommendation(s)

That the Acting Chief Executive exercises the delegated authority from Cabinet to appropriate the Council land identified in the Report for planning purposes pursuant to section 122 of the Local Government Act 1972 and use of the Council's powers pursuant to sections 203-206 of the Housing and Planning Act 2016 in respect of the land to be developed to override third party interests infringed by the Development

Reason(s)

To facilitate the delivery of the development on the site

The Cabinet of 20 April 2021 resolved to (Minute No 108):

(i) Agree, otherwise on the same terms as previously agreed by Cabinet under Minute 117 (17 March 2020), to:

(a) the acquisition of the Developer's Land for planning purposes pursuant to section 227 of the Town and Country Planning Act 1990 (the "1990 Act"), as shown edged green on the plan at Appendix 3 to the report (the "Developer's Land");

(b) the appropriation of the Council's land for planning purposes pursuant to section 122 of the Local Government Act 1972 ("1972 Act") as required to deliver the Development in accordance with Planning Consent 19/00855/FUL, as shown edged red on the plan at Appendix 2 to the report (the "Council's Land");

(c) the disposal of the revised site area as required to deliver the Development in accordance with Planning Consent 19/00855/FUL, as shown edged red on the plan at Appendix 1 to the report (the "Land");

- (ii) Approve the principle of contracting with a UK registered wholly owned subsidiary of the Developer on the same terms as previously agreed for the development;
- (iii) Delegate authority to the Managing Director, in consultation with Strategic Director of Law and Governance and the Cabinet Member for Regeneration and Social Housing, to agree (a) the new contracting party after appropriate due diligence had been undertaken, and (b) the contract documents to fully implement and effect the proposals set out in the report;
- (iv) Authorise the Strategic Director of Law and Governance, or an authorised delegate on her behalf, in consultation with the Managing Director, to execute all the legal agreements, contracts and other documents on behalf the Council; and
- (v) Delegate authority to the Managing Director to acquire the Developer's Land pursuant to s227 of the 1990 Act, appropriate the Council's Land pursuant to section 122 of the 1972 Act and use of the Council's powers pursuant to sections 203-206 of the Housing and Planning Act 2016 ("HPA 2016") in respect of the Land to override third party interests infringed by the Development.

1. Introduction and Background

- 1.1 In April 2021, Cabinet re-confirmed and amended its various earlier resolutions in September 2018, and March & October 2020, to enter into a residential-led joint development scheme of 196 mixed tenure units with Robyna Ltd (the Developer) on land separately owned by the Council and Developer; whereby the Council will acquire the freehold ownership of the Developer's Land and, upon completion of the scheme, grant the Developer a head lease of the Land for 250 years subject to the payment of a head rent. In addition, the Council will provide the developer with a construction loan of up to £44m. The Cabinet also approved the acquisition of the Developer's Land pursuant to section 227 of the 1990 Act and the appropriation of the Council's Land for planning purposes pursuant to section 122 of the 1972 Act.
- 1.2 A development agreement, along with an indemnity agreement and various associated documents, were exchanged on 20th January 2022. Upon exchange, the freehold interest in the Developer's Land (the former White Horse Public House) was also transferred to the Council.
- 1.3 The indemnity agreement requires the Developer for a period of no less than six (6) weeks following date of the Indemnity Deed to comply with the requirements of paragraphs 3.3 and 3.4 of the 17 March 2020 Cabinet Report in a manner agreed with the Council's Agent (acting reasonably) and to provide evidence of such compliance to the Council to the satisfaction of the Council and/or the Council's Agent prior to the Council advancing the Appropriation process.
- 1.4 Paragraphs 3.3 of the 17 March 2020 Cabinet Report states:

"Prior to steps being taken to give effect to the resolution recommended, the Council's intention to use its powers of appropriation (so as to engage the provisions of section 203 of the HPA 2016) will be publicised. The notice will invite anyone who considers they may be affected by the Development as a result of a third party interest to engage in respect of any outstanding issues the recipient may have.

Parties considered to be potentially affected by the act of appropriation will be written to in order to explain that the Council is considering using its powers of appropriation and that this report has been made with the recommendation to engage section 203 of the HPA (subject to the conditions set out)."

1.5 Paragraph 3.4 of the Cabinet report states as follows:

"The deed of indemnity which the Developer is required to enter into will require the Developer to satisfy the Council that it is appropriate to authorise the use of section 203 powers. It will ensure that evidence of the Developer's engagement and negotiations will be presented to the Council. In particular, evidence will be required to the Council's reasonable satisfaction to demonstrate a reasonable attempt has been made to reach a negotiated settlement with those with third party rights affected by the Development who have come forward (including, but not limited to, a schedule setting out the progress of negotiations with such persons and copies of properly made objections received pursuant to the publication/consultation exercise). Any dispute which remains unresolved will be evaluated before any delegated decision is made, to ensure that reasonable efforts to release rights by agreement have been made by the Developer where claims have been made. If, notwithstanding reasonable attempts to reach a negotiated settlement regarding such claims, agreement cannot be reached and binding deeds of release entered into with affected owners bringing such claims in reasonable time to ensure that the Development comes forward in a timely manner, the report seeks delegated authority to the Chief Operating Officer to make the final decision to authorise use of section 203 powers once s/he is satisfied that the agreed engagement with third parties has taken place".

1.6 All costs, claims and compensation associated with both the consultation process and arising from the appropriation claims are underwritten by way of an indemnity from the Developer.

2. Proposal and Issues

- 2.1 Consistent with the 17 March 2020 Cabinet Report the Developer has served on behalf of the Council letters of consultation (the "**Consultation Letters**"). The Consultation Letters were served on all those with an interest in properties surrounding the Land. It was agreed with the Developer that a 250m radius was a reasonable proximity to adopt for these purposes (the "**Consultation Properties**").
- 2.2 The Developer has now completed the consultation process noted above and a report from their lawyer and a letter from their retained rights to light surveyor is attached at Appendix 1. The report and letter summarise the actions taken by the Developer, the parties consulted and the status of negotiations. Appendix 1 is to remain confidential.
- 2.3 The Council have been advised throughout by Point 2 Surveyors Limited (being the "Council's Agent") and Gowling WLG. They have reviewed the report and letter submitted by the Developer and consider that appropriate consultation has been undertaken by the Developer.
- 2.4 Following the completion of the consultation process the 17 March 2020 Cabinet Report notes that evidence will be required to the Council's reasonable satisfaction

to demonstrate a reasonable attempt has been made to reach a negotiated settlement with those with third party rights affected by the Development who have come forward (including, but not limited to, a schedule setting out the progress of negotiations with such persons and copies of properly made objections received pursuant to the publication/consultation exercise).

- 2.5 As at 7 March 2022 which was specified to be the deadline for submitting questionnaires in the Consultation Letters, four questionnaires were received in respect of three Consultation Properties. An additional questionnaire was also received on 8 March 2022. None of the questionnaires received contain any detail about potentially affected rights or interests of the Consultation Properties. Further correspondence was submitted to the Consultation Properties on 15 March (the **"Follow Up Letters"**) requesting detail of the potentially affected rights or interests that will be affected by the Development. Where an additional questionnaire was received outside of the stated deadline, a Follow Up Letter was sent with the deadline for a response adjusted accordingly.
- 2.6 Although responses to the Follow Up Letters were received, none of the correspondence received contains any detail as to potentially affects rights or interests of the Consultation Properties. The Developer and the Council have considered the responses to the consultation exercise, as summarised in the report from the Developer's solicitor and a letter from the Developer's rights to light surveyor, both at Appendix 1. From reviewing the original rights to light report and calculations, it would appear that the properties associated with the respondents will not experience an injury to any rights to light that they may enjoy as a result of the Development. The Council's Agent has reviewed the documents at Appendix 1 and, although the agreed strategy provided that a letter of 'no issue' would be sent to respondents setting out that their rights of light over the Land will not be breached by the Development, the Developer does not propose to do so, given that no respondents have asserted any such right. The Council's Agent has reviewed this approach and considers it acceptable in the circumstances.
- 2.7 The Developer is in proactive negotiations with the freehold owner of the Barking Telephone Exchange ("BTE") and an offer of compensation (based on expert advice) has been made to them. The Council's Agent has advised the Council that it is satisfied that a reasonable attempt is being made by the Developer to reach a negotiated settlement with BTE.
- 2.8 The Council has been advised throughout by Gowling WLG and the Council's Agent. They have reviewed the further report submitted by the Developer and consider that no further negotiation is required. It is considered that the requirements of paragraph 3.3 and 3.4 of the 17 March 2020 Cabinet Report have been complied with.

3. Options Appraisal

- 3.1 The development agreement is conditional on the Council appropriating, subject to the Developer first having undertaken appropriate consultation and, where appropriate, negotiation with neighbouring properties. Should appropriation not take place, it is unlikely that the Developer would proceed with the Development such that the key benefits of the Development (as set out in the Report of 17 March 2020) will not be realised.

4. Consultation

- 4.1 As noted above the Developer has undertaken a consultation and negotiation process with neighbouring properties as required before appropriation.

5. Financial Implications

Implications completed by: David Dickinson, Investment Fund Manager

- 5.1 None. All costs, claims and compensation associated with appropriation are underwritten by way of an indemnity from the developer

6. Legal Implications

Implications completed by: Ann Towndrow, Property Lawyer

- 6.1 The Council may appropriate land for planning purposes pursuant to s122 of the 1972 Act.
- 6.2 Development works may be carried out notwithstanding interference with rights or interests of third parties pursuant to s203 of the HPA 2016. Compensation may be payable for interference with rights or interests overridden by s203.
- 6.3 The appropriation of the Council land was approved by Cabinet at the meeting on 20 April 2021 and delegated authority was given to the Managing Director to implement the appropriation and for the use of the powers in the HPA 2016.

7. Other Implications

- 7.1 **Contractual Issues** - As noted above the development agreement is conditional on the Council appropriating, subject to the developer first having undertaken consultation with neighbouring properties. Should appropriation not take place, the development agreement will fall and the development not proceed.
- 7.2 **Corporate Policy and Equality Impact** - The developer has undertaken the required pre-appropriation consultation. The developer's consultation process was agreed and approved for the Council by Gowling WLG's Planning Team, external solicitors for the Council, and Point 2 Surveyors Limited, specialist rights of light chartered surveyors.
- 7.3 **Property / Asset Issues** - None. All costs, claims and compensation associated with appropriation are underwritten by way of an indemnity from the developer.

Public Background Papers Used in the Preparation of the Report: None.

List of confidential appendices (Appendix 1):

- Report from Osbourne Clarke (lawyer for the Developer) summarising the consultation process (Confidential).
- Letter from GIA (rights to light surveyor for the Developer) summarising the practical impacts of the Development on the rights to light of neighbouring properties and the status of negotiations (Confidential).